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DEPARTMENT OF JUSTICE

Bureau of Alcohol, Tobacco, Firearms, and Explosives

27 CFR Part 478

[Docket No. ATF 22I; AG Order No. 3337–2012]

RIN 1140-AA44

Residency Requirements for Aliens Acquiring Firearms (2011R-23P)

AGENCY: Bureau of Alcohol, Tobacco, Firearms, and Explosives (ATF), Department of Justice.

ACTION: Interim final rule with request for comments.

SUMMARY: The Department of Justice is amending the regulations of the Bureau of Alcohol, Tobacco, Firearms, and Explosives (ATF) by removing the 90-day State residency requirement for aliens lawfully present in the United States to purchase or acquire a firearm. The Department has determined that the Gun Control Act does not permit ATF to impose a regulatory requirement that aliens lawfully present in the United States are subject to a 90-day State residency requirement when such a requirement is not applicable to U.S. citizens. In addition, upon the effective date of this interim final rule the provisions of ATF Ruling 2004-1 will become obsolete.

DATES: Effective date: This interim rule is effective on July 9, 2012.

Comment date: Written comments must be postmarked and electronic comments must be submitted on or before [INSERT DATE 90 DAYS AFTER DATE OF

PUBLICATION IN THE FEDERAL REGISTER]. Commenters should be aware that the electronic Federal Docket Management System will not accept comments after Midnight Eastern Time on the last day of the comment period.

ADDRESSES: Send comments to any of the following addresses—

- James P. Ficareta, Program Manager, Mailstop 6N-602, Bureau of Alcohol, Tobacco, Firearms, and Explosives, 99 New York Avenue, NE., Washington, DC 20226; ATTN: ATF 22I. Written comments must appear in minimum 12 point font size (.17 inches), include your mailing address, be signed, and may be of any length.

- 202-648-9741 (facsimile).
- <http://www.regulations.gov>. Federal eRulemaking portal; follow the instructions for submitting comments.

You may also view an electronic version of this rule at the <http://www.regulations.gov> site.

See the Public Participation section at the end of the **SUPPLEMENTARY INFORMATION** section for instructions and requirements for submitting comments, and for information on how to request a public hearing.

FOR FURTHER INFORMATION CONTACT: James P. Ficareta, Enforcement Programs and Services, Bureau of Alcohol, Tobacco, Firearms, and Explosives, U.S. Department of Justice, 99 New York Avenue, NE., Washington, DC 20226, telephone (202) 648-7094.

SUPPLEMENTARY INFORMATION:

I. Background

Section 922(b)(3) of the Gun Control Act of 1968 (GCA), 18 U.S.C. 922(b)(3), makes it unlawful for a Federal firearms licensee (FFL) to sell or deliver any firearm to any nonlicensee who the licensee knows or has reasonable cause to believe does not reside in the State in which the licensee's place of business is located. Exceptions are provided for over-the-counter transfers of a rifle or shotgun to out-of-State residents if the transfers fully comply with the State laws of the buyer and seller, and for loans and rentals of a firearm for temporary use for lawful sporting purposes. Regulations that implement section 922(b)(3) are contained in 27 CFR 478.99(a).

The term "State of residence" is defined in 27 CFR 478.11 as "[t]he State in which an individual resides. An individual resides in a State if he or she is present in a State with the intention of making a home in that State." In addition, for aliens, the definition also provides that "[a]n alien who is legally in the United States shall be considered to be a resident of a State only if the alien is residing in the State and has resided in the State for a period of at least 90 days prior to the date of sale or delivery of a firearm." This 90-day length of residency requirement does not apply to U.S. citizens.

Prior to making a transfer of a firearm to a nonlicensed individual who is a resident of the State in which the licensee's business premises are located, the regulations at § 478.124(c) require the licensee to obtain from the transferee (buyer) a completed ATF Form 4473, Firearms Transaction Record, that shows certain information, including whether the transferee is a citizen of the United States, and an affirmative statement as to the transferee's State of residence. In addition, before transferring to such a nonlicensee a firearm, the licensee must obtain from the transferee documentation establishing that the transferee is a resident of the State in which the licensee's business premises are

located. That is, each transferee must present proof of residence in the State, in the form of a government-issued identification document (for example, a driver's license or State-issued identification card) containing the person's name, residence address, date of birth, and photograph. In the case of a transferee who is an alien legally in the United States and who is otherwise not prohibited from possessing a firearm, the licensee must additionally obtain from the transferee documentation establishing that the transferee has continuously resided in the State for 90 days. The licensee must also note on the form the documentation used to establish this 90-day period of residency. Examples of acceptable documentation include utility bills or a lease agreement showing that the purchaser has resided in the State continuously for at least 90 days prior to the transfer of the firearm.

Section 478.124(d), relating to the exception for over-the-counter transfers of a shotgun or rifle to out-of-State residents if the transfers fully comply with the State laws of the buyer and seller, requires purchasers to present to the licensee documentation establishing that the transferee is a resident of any State. In the case of a nonlicensee who is an alien lawfully in the United States, the licensee must additionally obtain from the transferee documentation that the transferee has resided in such State continuously for at least 90 days prior to the transfer of the firearm. Again, examples of acceptable documentation include utility bills or a lease agreement showing that the purchaser has resided in the State continuously for at least 90 days prior to the transfer of the firearm.

Section 478.125(f)(2), relating to firearms receipt and disposition by licensed collectors, provides that the licensee must, in the case of a transferee who is an alien legally in the United States (and who is not a licensee), verify the identity of the transferee by examining a valid identification document and obtain from the transferee

documentation establishing that the transferee is a resident of the State in which the licensee's business premises are located if the firearm is other than a shotgun or rifle. If the firearm is a shotgun or rifle, the licensee must obtain from the transferee documentation establishing that the transferee is a resident of any State and has resided in such State continuously for at least 90 days prior to the transfer of the firearm.

II. ATF Ruling 2004-1

ATF has received questions from aliens concerning the State of residence requirement. Several aliens have asked why they were prohibited from purchasing a firearm from a Federal firearms licensee, contending that they had lived in the State where the licensee was licensed for more than 90 days. In response to those concerns, ATF issued a ruling clarifying that an FFL may not lawfully transfer a firearm to a nonimmigrant alien unless he or she has resided in a State continuously for at least 90 days immediately prior to the FFL conducting a National Instant Criminal Background Check System (NICS) check (ATF Rul. 2004-1, dated March 22, 2004). In addition, the ruling held that if a NICS check demonstrates a nonimmigrant alien has left the United States during the 90 days immediately preceding the NICS check, the nonimmigrant alien does not satisfy the 90-day State of residency requirement. This is the case even if the nonimmigrant alien has provided other documentation, such as utility bills or a lease agreement, to demonstrate 90 days of residency immediately preceding the NICS check. Although ATF Rul. 2004-1 specifically addresses transfers of firearms to nonimmigrant aliens, the residency requirement applies to all aliens.

III. Department Determination

During the review process for a related rulemaking proceeding, Department of Justice officials raised legal concerns regarding the 90-day residency requirement for aliens lawfully in the United States who wish to purchase a firearm from an FFL. The Department concluded that, as a matter of law, the definition of “State of residence” in § 478.11, which differentiates between U.S. citizens and aliens, is not a permissible interpretation of section 922(b)(3) of the GCA insofar as it applies a 90-day residency requirement to lawfully present aliens only. See Clark v. Martinez, 543 U.S. 371, 378 (2005) (holding that a single, undifferentiated statutory term cannot be given varying meanings with respect to different categories of persons to which the statutory provision applies). The Department determined that, as a matter of law, nothing in the text of section 922(b)(3) indicates that Congress intended the phrase “State of residence” to have different meanings for different categories of people. Section 922(b)(3) includes the term ‘reside in’ without any further differentiation or specification. The statute might support a range of meanings for the phrase ‘reside in,’ but it does not support an interpretation that gives the phrase different meanings when applied to lawfully present aliens and U.S. citizens.

The Department’s determination is based on advice received from its Office of Legal Counsel (OLC) (See memorandum of January 30, 2012, at <http://www.justice.gov/olc/2012/ATF90dayruleFINAL1-30-12.pdf>).

IV. Interim Final Rule

Based on the Department’s legal determination that the State of residence requirement imposed by section 922(b)(3) cannot have two different constructions—one that applies to U.S. citizens and another that applies to lawfully present aliens—the

Department is publishing this interim final rule to make the necessary changes to existing regulations. This rule amends the regulations in 27 CFR Part 478 by removing the 90-day residency requirement in the definition of “State of residence” in § 478.11. The rule also removes the unique proof of residency requirements in §§ 478.124 and 478.125 for aliens purchasing a firearm. Therefore, upon the effective date of this interim final rule, an alien lawfully present in the United States acquiring a firearm will be subject to the same residency and proof of residency requirements that apply to U.S. citizens.

In addition, upon the effective date of this interim final rule, ATF Ruling 2004-1 (approved March 22, 2004) will become obsolete.

How This Document Complies With the Federal Administrative Requirements for Rulemaking

A. Executive Order 12866 and Executive Order 13563

This rule has been drafted and reviewed in accordance with Executive Order 12866, “Regulatory Planning and Review,” section 1(b), The Principles of Regulation, and with Executive Order 13563, “Improving Regulation and Regulatory Review.” The Department of Justice has determined that this rule is a “significant regulatory action” under Executive Order 12866, section 3(f), and accordingly this rule has been reviewed by the Office of Management and Budget (OMB). However, this rule will not have an annual effect on the economy of \$100 million, nor will it adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health, or safety, or State, local or tribal governments or communities. Accordingly, this rule is not an economically significant rulemaking action as defined by Executive Order 12866.

The interim final rule removes restrictions and lessens burdens on various parties. It removes the 90-day residency requirement applicable only to aliens legally in the United States and not to citizens, as well as the requirement that aliens, but not citizens, purchasing a firearm provide proof of 90 days continuous residency through substantiating documentation (e.g., utility bills or a lease agreement). Upon the rule's effective date, lawfully present aliens and U.S. citizens will be subject to the same residency and proof of residency requirements. This will reduce the time burden on both nonlicensees (i.e., aliens lawfully present in the United States) and licensees from completing the paperwork requirements associated with transferring firearms. As explained below, ATF estimates that this rule will reduce such burdens by approximately 2,457 hours (1,867 hours for nonlicensees + 590 hours for licensees).

The burden placed on all nonlicensees acquiring firearms, including alien purchasers, involves the time it takes to indicate their State of residence on ATF Form 4473. In calendar year 2010, ATF estimates that Form 4473 was completed 14,409,616 times and that it took four seconds for a firearms purchaser to provide his or her State of residence on the form. As such, ATF estimates the total time for firearms purchasers to indicate their State of residence on the form to be approximately 16,010 hours. In the case of an alien purchaser who is legally in the United States, the purchaser must provide the licensee with proof of residency through the use of documentation showing that the individual has resided in the State continuously for at least 90 days prior to the transfer of the firearm. ATF estimates that in calendar year 2010, approximately 23,582 aliens purchased firearms. ATF estimates the burden on alien purchasers to comply with this requirement was approximately 4.75 minutes with an annual burden of approximately

1,867 hours (23, 582 x 4.75 minutes = 1,867 hours). The interim final rule eliminates this burden.

As indicated, the interim final rule also reduces the economic burden on licensees as it relates to Form 4473. According to ATF's National Licensing Center, there are approximately 60,844 Federal firearms licensees engaged in the business of selling firearms. Before transferring a firearm to an alien legally in the United States, the licensee must obtain from the transferee documentation establishing that the transferee has been a resident of the State in which the licensee's business premises are located for at least 90 days and note on the Form 4473 the documentation used for that purpose. ATF estimates the burden placed on a licensee to comply with this requirement to be approximately 1.50 minutes per alien purchaser, with an annual burden of approximately 590 hours (23,582 x 1.50 minutes = 590 hours). The interim final rule removes this burden.

B. Executive Order 13132

This regulation will not have substantial direct effects on the States, on the relationship between the Federal Government and the States, or on the distribution of power and responsibilities among the various levels of government. Therefore, in accordance with section 6 of Executive Order 13132, the Attorney General has determined that this regulation does not have sufficient federalism implications to warrant the preparation of a federalism summary impact statement.

C. Executive Order 12988

This regulation meets the applicable standards set forth in sections 3(a) and 3(b)(2) of Executive Order 12988.

D. Administrative Procedure Act (APA)

This interim final rule is being published with a process for post-promulgation submission of public comments. Pursuant to section 553(b)(3)(B) of the Administrative Procedure Act, 5 U.S.C. 553(b)(3)(B), the APA's general requirement to allow for public notice and comment prior to the promulgation of a rule does not apply when an agency finds, for "good cause," that such prior notice and comment procedures are "impracticable, unnecessary, or contrary to the public interest." The Department of Justice has concluded as a matter of law that the State of residence requirement in the Gun Control Act cannot have two different constructions, one that applies to U.S. citizens and another that applies to lawfully present aliens, because the statutory text applies the requirement, without distinction, to a covered sale or delivery of a firearm to "any person." This conclusion is compelled by Supreme Court decisions holding that a single undifferentiated statutory term must be given a single interpretation across all of its potential applications. See, e.g., Clark v. Martinez, 543 U.S. 371, 378 (2005); United States v. Santos, 533 U.S. 507 (2008). Section 27 CFR 478.11 does not currently conform with that legal conclusion, because it requires lawfully present aliens to meet an extra requirement in order to demonstrate residency. As a result, there is a discrepancy between the current regulatory definition and the Department's interpretation of the statute on which that definition is based. For as long as that discrepancy persists, a departmental regulation will bar some lawfully present aliens from purchasing firearms on the basis of a requirement the Department has concluded is not consistent with applicable law. Because ATF must, as a matter of law, rectify that discrepancy, pre-publication public comment is unnecessary, and good cause therefore exists for issuing

this rule without employing the usual notice and comment procedures of the APA.

Additionally, the Attorney General finds that delaying this regulatory action would be contrary to the public interest. The Department, however, welcomes public comment on this interim final rule after the rule is published.

E. Regulatory Flexibility Act

The provisions of the Regulatory Flexibility Act relating to an initial and final regulatory flexibility analysis are not applicable to this rule because the agency was not required to publish a general notice of proposed rulemaking under 5 U.S.C. 553 or any other law.

F. Small Business Regulatory Enforcement Fairness Act of 1996

This rule is not a major rule as defined by section 251 of the Small Business Regulatory Enforcement Fairness Act of 1996, 5 U.S.C. 804. This rule will not result in an annual effect on the economy of \$100 million or more; a major increase in costs or prices; or significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based enterprises to compete with foreign-based enterprises in domestic and export markets.

G. Unfunded Mandates Reform Act of 1995

This rule will not result in the expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of \$100 million or more in any one year, and it will not significantly or uniquely affect small governments. Therefore, no actions were deemed necessary under the provisions of the Unfunded Mandates Reform Act of 1995, Public Law 104-4.

H. Paperwork Reduction Act

The regulations that are being amended in this interim final rule revise collections of information covered by the Paperwork Reduction Act of 1995, Public Law 104-13, 44 U.S.C. ch. 35, and its implementing regulations, 5 CFR Part 1320. The collections of information at §§ 478.124 and 478.125 were approved by OMB under control numbers 1140-0020 and 1140-0021 (§ 478.124), and 1140-0032 (§ 478.125). ATF requested emergency clearance from OMB of revisions to control number 1140-0020 (Form 4473) to conform with these regulatory changes, and OMB approved those revisions on April 13, 2012, for a period of 180 days. On October 4, 2011, at ATF's request, the approval on the collection of information under 1140-0021 was discontinued.

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a valid control number assigned by OMB.

Public Participation

A. Comments Sought

ATF is requesting comments on the interim final rule from all interested persons. ATF is also specifically requesting comments on the clarity of this interim final rule and how it may be made easier to understand.

All comments must reference this document docket number (ATF 22I), be legible, and include your name and mailing address. ATF will treat all comments as originals and will not acknowledge receipt of comments.

Comments received on or before the closing date will be carefully considered. Comments received after that date will be given the same consideration if it is practical to

do so, but assurance of consideration cannot be given except as to comments received on or before the closing date.

B. Confidentiality

Comments, whether submitted electronically or on paper, will be made available for public viewing at ATF, and on the Internet as part of the eRulemaking initiative, and are subject to the Freedom of Information Act. Commenters who do not want their name or other personal identifying information posted on the Internet should submit their comment by mail or facsimile, along with a separate cover sheet that contains their personal identifying information. Both the cover sheet and comment must reference this docket number. Information contained in the cover sheet will not be posted on the Internet. Any personal identifying information that appears within the comment will be posted on the Internet and will not be redacted by ATF.

Any material that the commenter considers to be inappropriate for disclosure to the public should not be included in the comment. Any person submitting a comment shall specifically designate that portion (if any) of his comments that contains material that is confidential under law (e.g., trade secrets, processes, etc.). Any portion of a comment that is confidential under law shall be set forth on pages separate from the balance of the comment and shall be prominently marked “confidential” at the top of each page. Confidential information will be included in the rulemaking record but will not be disclosed to the public. Any comments containing material that is not confidential under law may be disclosed to the public. In any event, the name of the person submitting a comment is not exempt from disclosure.

C. Submitting Comments

Comments may be submitted in any of three ways:

- Mail: Send written comments to the address listed in the **ADDRESSES** section of this document. Written comments must appear in minimum 12 point font size (.17 inches), include your mailing address, be signed, and may be of any length.

- Facsimile: You may submit comments by facsimile transmission to (202) 648-9741. Faxed comments must:

- (1) Be legible and appear in minimum 12 point font size (.17 inches);

- (2) Be on 8½” x 11” paper;

- (3) Contain a legible, written signature; and

- (4) Be no more than five pages long. ATF will not accept faxed comments that exceed five pages.

- Federal eRulemaking Portal: To submit comments to ATF via the federal eRulemaking portal, visit <http://www.regulations.gov> and follow the instructions for submitting comments.

D. Request for hearing

Any interested person who desires an opportunity to comment orally at a public hearing should submit his or her request, in writing, to the Director of ATF within the 90-day comment period. The Director, however, reserves the right to determine, in light of all circumstances, whether a public hearing is necessary.

Disclosure

Copies of this interim rule and the comments received will be available for public inspection by appointment during normal business hours at: ATF Reading Room, Room 1E-062, 99 New York Avenue, NE., Washington, DC 20226, telephone (202) 648-8740.

Drafting Information

The author of this document is James P. Ficareta, Enforcement Programs and Services, Bureau of Alcohol, Tobacco, Firearms, and Explosives.

List of Subjects in 27 CFR Part 478

Administrative practice and procedure, Arms and ammunition, Authority delegations, Customs duties and inspection, Domestic violence, Exports, Imports, Law enforcement personnel, Military personnel, Nonimmigrant aliens, Penalties, Reporting and recordkeeping requirements, Research, Seizures and forfeitures, and Transportation.

Authority and Issuance

Accordingly, for the reasons stated in the preamble, 27 CFR Part 478 is amended as follows:

PART 478--COMMERCE IN FIREARMS AND AMMUNITION

1. The authority citation for 27 CFR Part 478 continues to read as follows:

Authority: 5 U.S.C. 552(a); 18 U.S.C. 847, 921-931; 44 U.S.C. 3504(h).

2. Section 478.11 is amended by revising the definition of “State of residence” to read as follows:

§ 478.11 Meaning of terms.

* * * * *

State of residence. The State in which an individual resides. An individual resides in a State if he or she is present in a State with the intention of making a home in that State. If an individual is on active duty as a member of the Armed Forces, the individual’s State of residence is the State in which his or her permanent duty station is

located, as stated in 18 U.S.C. 921(b). The following are examples that illustrate this definition:

Example 1. A maintains a home in State X. A travels to State Y on a hunting, fishing, business, or other type of trip. A does not become a resident of State Y by reason of such trip.

Example 2. A maintains a home in State X and a home in State Y. A resides in State X except for weekends or the summer months of the year and in State Y for the weekends or the summer months of the year. During the time that A actually resides in State X, A is a resident of State X, and during the time that A actually resides in State Y, A is a resident of State Y.

Example 3. A, an alien, travels to the United States on a three-week vacation to State X. A does not have a state of residence in State X because A does not have the intention of making a home in State X while on vacation. This is true regardless of the length of the vacation.

Example 4. A, an alien, travels to the United States to work for three years in State X. A rents a home in State X, moves his personal possessions into the home, and his family resides with him in the home. A intends to reside in State X during the 3-year period of his employment. A is a resident of State X.

* * * * *

3. Section 478.124 is amended as follows:

a. By removing and reserving paragraph (c)(3)(ii).

b. In paragraph (d), by removing the proviso after the colon and by removing the colon and adding in its place a period.

c. In paragraph (e), by removing the words “, except for the provisions of paragraph (c)(3)(ii)” at the end of the paragraph.

d. In paragraph (f), by removing the words “, and in the case of a transferee who is an alien legally in the United States, the transferee has resided in that State continuously for at least 90 days prior to the transfer of the firearm” in the third sentence.

4. Section 478.125(f) is revised to read as follows:

§ 478.125 Record of receipt and disposition.

* * * * *

(f) Firearms receipt and disposition by licensed collectors. (1) Each licensed collector shall enter into a record each receipt and disposition of firearms curios or relics. The record required by this paragraph shall be maintained in bound form under the format prescribed below. The purchase or other acquisition of a curio or relic shall, except as provided in paragraph (g) of this section, be recorded not later than the close of the next business day following the date of such purchase or other acquisition. The record shall show the date of receipt, the name and address or the name and license number of the person from whom received, the name of the manufacturer and importer (if any), the model, serial number, type, and the caliber or gauge of the firearm curio or relic. The sale or other disposition of a curio or relic shall be recorded by the licensed collector not later than 7 days following the date of such transaction. When such disposition is made to a licensee, the commercial record of the transaction shall be retained, until the transaction is recorded, separate from other commercial documents maintained by the

licensee, and be readily available for inspection. The record shall show the date of the sale or other disposition of each firearm curio or relic, the name and address of the person to whom the firearm curio or relic is transferred, or the name and license number of the person to whom transferred if such person is a licensee, and the date of birth of the transferee if other than a licensee. In addition, the licensee shall cause the transferee, if other than a licensee, to be identified in any manner customarily used in commercial transactions (e.g., a driver's license), and note on the record the method used.

(2) The format required for the record of receipt and disposition of firearms by collectors is as follows:

FIREARMS COLLECTORS ACQUISITION AND DISPOSITION RECORD

Description of firearm					Receipt		Disposition			
Manufacturer and/or importer	Model	Serial No.	Type	Caliber or gauge	Date	Name and address or name and license No.	Date	Name and address or name and license No.	Date of birth if non-licensee	Driver's license No. or other identification if non-licensee

* * * * *

June 1, 2012 _____
Date

Eric H. Holder, Jr.
Attorney General

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